ORIGINAL
FILE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for	)	CC Docket No. 92-13
Interstate Common Carriers	)	

RECEIVED

MAR 30 1992

Federal Communications Commission
Office of the Secretary

COMMENTS OF METROPOLITAN FIBER SYSTEMS, INC.

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March 30, 1992

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SUMMARY

The Commission's tariff forbearance policy is lawful, and should not be modified or abandoned. This rulemaking docket should be dismissed as unnecessary.

The legality of the forbearance policy has been drawn into question by AT&T's challenge, based upon an exceedingly strict reading of Section 203 of the Communications Act and an analogy to the U.S. Supreme Court's interpretation of the Interstate Commerce Act. This challenge should be rejected for the following reasons.

First, the Communications Act itself contains provisions that grant the Commission flexibility in applying the tariff requirements of Section 203(a). In the *Competitive Carrier Rulemaking*, the Commission construed these provisions in harmony with the overall legislative purposes of the Act and concluded that it has been delegated authority to determine whether the application of particular regulatory tools (such as tariffs) would advance the Congressional purposes. Where such tools are inconsistent with the public interest, as in the case of tariff regulation of non-dominant carriers, the Commission may forbear from exercising them. Under well-accepted principles of administrative law, this interpretation of the statute by the expert agency in the field is entitled to considerable weight, and should not be abandoned lightly.

Second, Congress plainly recognized and affirmed the Commission's forbearance authority in 1990, by creating a limited exception to that authority in the Operator Services Act. There would have been no need for the adoption of "informational tariff" provisions in Section 226(h) of the Communications Act unless Congress knew that non-

dominant carriers generally were exempt from filing tariffs, and intended to make a limited exception to that rule. Any other interpretation of the 1990 legislation would be irrational, as it would mean either that Congress intended to subject operator services to a lesser degree of regulation than any other common carrier service, or intended to impose purely meaningless and duplicative filing requirements on carriers that were already subject to the allegedly absolute tariff obligation of Section 203.

Third, the Supreme Court's interpretation of the Interstate Commerce Act is irrelevant to this proceeding. Even before the 1990 amendments, there were significant differences between the Interstate Commerce Act and the Communications Act provisions relating to tariffs, so that the interpretation of one would not necessarily be applicable to the other. The Congressional confirmation of general forbearance authority in the 1990 legislation, moreover, removes any parallel between the two statutes. In particular, the most recent (1980) amendment to the Interstate Commerce Act reflected clear Congressional intention to continue tariffing for most carriers. That legislation expressly granted the ICC tariff exemption authority with respect to a single class of carriers and no others, whereas the 1990 Operator Services Act placed new conditions upon this Commission's existing general forbearance authority with respect to a particular class of services.

In the event that tariff forbearance were held unlawful following a full legal analysis, the consequences would be profound. If the Commission does not have authority to forbear from tariff regulation of *some* common carriers, then it could not have such authority with respect to *any*; this means that every carrier, including reseller,

that offers communications services on an indiscriminate basis would have to file tariffs. The economic burdens of such a requirement—both upon private parties and upon the taxpayers—would be substantial.

If the Commission is compelled to reimpose tariff regulation on non-dominant carriers, therefore, it should seek to do so in a way that imposes the *minimum* burdens required by the statute. The Commission should undertake a top-to-bottom review of its tariff regulations and exempt non-dominant carriers from any and all provisions that are not absolutely central to the statutory scheme. In particular, MFS would recommend that non-dominant carriers be permitted to file tariffs on one day's notice, without cost support, in a streamlined format (including authority to cross-reference the tariffs of other carriers), and with a presumption of lawfulness.

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COMMENTS OF METROPOLITAN FIBER SYSTEMS, INC.

Metropolitan Fiber Systems, Inc. ("MFS"), by its undersigned counsel, hereby submits its comments in response to the Notice of Proposed Rulemaking (the *"NPRM"*) released in this docket on January 28, 1992 (FCC 92-35).

For the reasons discussed below, the Commission's current policy of forbearance from tariff regulation for non-dominant common carriers is fully consistent with the Communications Act and represents sound public policy. This rulemaking proceeding should therefore be dismissed.

In the alternative, however, if it should be determined, following careful legal analysis, that the current forbearance policy is unlawful, MFS urges the Commission to implement *maximum* streamlined regulation of the tariffs of non-dominant carriers. This policy would be needed to avoid unnecessarily burdening regulated entities, with no corresponding public benefit, and thwarting developing competition in important segments of the telecommunications industry. This objective is particularly pertinent in the case of the embryonic competitive access industry, where MFS fears that local exchange carriers may seek to utilize the tariff process aggressively against non-dominant

access providers to erect regulatory barriers to, and retard the introduction of, competitive service offerings.

I. INTRODUCTION AND STATEMENT OF INTEREST

MFS is the largest and leading nationwide provider of competitive access services to business customers. MFS, through its subsidiaries, operates state-of-the-art digital fiber optic telecommunications networks in business districts of Baltimore, Boston, Chicago, Dallas, Houston, Los Angeles, Minneapolis, New York, Philadelphia, Pittsburgh, San Francisco, and Washington, D.C. (including suburban Maryland and Virginia). These networks provide a variety of point-to-point dedicated telecommunications transmission services within each of the 12 metropolitan areas served by MFS. These services include high-capacity digital transport (DS1 and DS3) and other services that are competitive with special access services of the dominant LECs, as well as a variety of innovative transport services (for example, European-standard E1 service and 100 megabit per second Local Area Network interconnection service) not generally offered by most LECs.

MFS' networks provide connections between end users and interexchange carrier ("IXC") points of presence, connections among and between IXC facilities, and (where authorized) point-to-point private line services between end-user premises. The overwhelming majority of MFS' services are used by customers (either end users or IXCs) to originate and/or terminate interstate and international communications, and therefore are subject to the jurisdiction of this Commission. MFS offers its interstate

access services to all customers located within reach of its fiber networks, and therefore is a "common carrier" within the meaning of Section 3(h) of the Communications Act of 1934 (the "Act"), 47 USC § 153(h).[1] As a non-dominant carrier, however, MFS is subject to the Commission's forbearance policy and therefore, under those regulatory requirements, is not required to file interstate tariffs.[2] That regulatory scheme has worked well and has materially contributed to the growth of new competitors and innovative services, in both the interexchange and competitive access arenas. Accordingly, MFS has a direct and substantial interest in the Commission's consideration of reimposing tariff filing requirements on the domestic interstate services of non-dominant carriers.

As a preliminary matter, MFS notes that the scope of this rulemaking docket is limited to the Commission's *tariff* forbearance policy, and not to any other aspect of the

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[1] *See NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976).

[2] "Dominant" carriers are defined as those that possess market power, and all other carriers are considered "non-dominant." *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor ("Competitive Carrier Rulemaking")*, First Report and Order, 85 FCC 2d 1, 20-21 (1980). The Commission has forborne from regulating the domestic interstate services of non-dominant carriers. *Id.*, Second Report and Order, 91 FCC 2d 59, 64 *et seq.* (1982), *recon. denied*, Third Report and Order, 93 FCC 2d 54 (1983), Fourth Report and Order, 95 FCC 2d 554, 577-79 (1983), *recon. denied*, Fifth Report and Order, FCC 84-394, 49 Fed. Reg. 34824, 34829-30 (September 4, 1984). *See also* the background discussion in paras. 3-5 of the *NPRM*.

The *Competitive Carrier* decisions specifically determined that several classes of common carriers fell into the non-dominant category, including among others "specialized common carriers," which were characterized as "providers of terrestrial voice and data services." Fourth Report and Order, 95 FCC 2d at 555 n.2. MFS falls within this category and therefore is a non-dominant carrier; however, MFS would be a non-dominant carrier in fact, because it lacks market power in the markets in which it provides service, even if the Commission had not expressly categorized the entire class of specialized common carriers as non-dominant.

Competitive Carrier policy decisions. As explained in the *NPRM*, this docket was opened specifically as an outgrowth of AT&T's complaint against MCI, which challenged the Commission's legal authority to permit that interexchange carrier to offer interstate services on terms that are not contained in tariffs under Section 203 of the Act.[3] Even if AT&T's position were to prevail as to the interpretation of Section 203, that would not affect the Commission's ability to classify carriers as dominant and non-dominant (or variants and sub-categories of same), to regulate the classes differently in light of market realities (but subject to the bounds imposed by statute), and to exempt non-dominant carriers from a variety of unnecessarily burdensome regulatory duties other than tariffing; *e.g.*, the need to seek authority under Section 214 of the Act before constructing or extending transmission lines. The policy and legal justifications for forbearance and streamlined regulation, as adopted in a series of decisions in the *Competitive Carrier* docket, remain valid today. MFS respectfully submits that this docket is not a forum for re-examining those policies, but only for determining the statutory validity of tariff forbearance as a particular means of implementing policy.

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[3] *See AT&T v. MCI*, E-89-297, FCC 92-36 (released Jan. 28, 1992), *appeal pending, AT&T v. FCC*, No. 92-1053 (D.C. Cir., petition for review filed Feb. 7, 1992); *NPRM*, paras. 1-2.

II. TARIFF FORBEARANCE IS AUTHORIZED BY THE COMMUNICATIONS ACT

A. Sections 203(b)(2) and 203(c) Empower the Commission to Exempt Carriers from Any Requirement Relating to Tariff Filing

The underlying premise of AT&T's complaint against MCI was the theory that Section 203 of the Act makes tariff filing mandatory, and that the Commission cannot waive or modify this requirement. Indeed, Section 203(a) of the Act does appear to impose a mandatory tariffing requirement: "Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission . . . schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . ." 47 USC § 203(a). Significantly, though, this provision cannot be read in isolation. It must be construed together with other portions of Section 203, and of the Act, which clarify and flesh out the basic requirements of subsection (a), permitting the Commission—as it has lawfully done—to modify that provision in light of its overall statutory obligations.

In the Second Report and Order in the *Competitive Carrier* docket, the Commission extensively reviewed the legislative history of the Act and subsequent judicial interpretations, and correctly concluded that it possesses "'substantial discretion in determining both what and how it can properly regulate,' so long as it is exercised in a manner that effectuates rather than frustrates the overriding statutory goals." 91 FCC 2d at 66, quoting *Shapiro v. United States*, 335 US 1, 31 (1948). It further concluded that tariff regulation of domestic resellers would not advance the statutory

goals and would impose unnecessary and unreasonable burdens upon this class of carriers (a conclusion extended in later orders, after careful analysis, to other classes of non-dominant carriers). As the expert agency in this field, the Commission's interpretation of its enabling statute is entitled to substantial deference, and the courts will rarely overturn such an administrative interpretation unless it is found to be inconsistent with the express terms of the statute. *See Chevron USA Inc. v. National Resources Defense Council, Inc.*, 467 US 837 (1984).

In this instance, the Commission's interpretation is consistent with the plain language of Section 203. Subsection (b)(2) of that section provides as follows:

> *The Commission may*, in its discretion and for good cause shown, *modify any requirement made by* or under the authority of *this section* either in particular instances or by general order applicable to special circumstances or conditions . . . .

47 USC § 203(b)(2) (emphasis added). This subsection, by its terms, permits the Commission to modify any requirement relating to the filing of tariffs, including those requirements imposed by the Act itself.[4] In addition, Section 203(c) provides, in pertinent part, that:

> No carrier, *unless otherwise provided* by or *under authority of this Act*, shall engage or participate in [interstate] communication unless schedules

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[4] One Court of Appeals has rejected the Commission's interpretation of this provision and declared that subsection (b)(2) only permits the Commission to modify requirements regarding the time and manner of filing, and not the filing obligation itself. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). Nonetheless, that court only held that the Commission could not prohibit non-dominant carriers from filing tariffs, and declined to rule on the validity of permissive forbearance. In any event, as discussed further in Section II.B of these Comments, the *MCI* decision is of dubious precedential value in light of the subsequent amendment of the Act in 1990.

> have been filed and published in accordance with the provisions of this Act . . . .

47 USC § 203(c) (emphasis added). The emphasized language recognizes the Commission's statutory authority to exempt carriers from the obligation to provide telecommunications services exclusively under tariff, or otherwise to modify common carriers' Section 2093 obligations.

Since the Act expressly contemplates that the Commission may modify tariffing requirements and may authorize the provision of service other than under tariff, the Commission's tariff forbearance policy is permissible under the Act.

B. The Tariff Forbearance Policy Was Ratified and Incorporated into the Act by Congress in 1990

As noted in the *NPRM*, Congress adopted in 1990 the Telephone Operator Consumer Services Improvement Act, which added Section 226 to the Communications Act. Among other things, that section requires the filing of "informational tariffs" by each provider of operator services, and also makes provision for the Commission to waive this requirement after 1994. 47 USC § 226(h). The Commission states that this amendment "appears to have recognized the operation of our forbearance rule . . . ." *NPRM*, para. 7.

MFS respectfully submits that the 1990 amendment did not just "recognize" the forbearance policy, but in fact affirmatively ratified it. As discussed below, neither the provisions of Section 226 itself, nor the legislative history of the amendment, make any

sense unless they are construed as affirmatively approving the Commission's tariff forbearance policy.[5]

The "informational tariff" provisions of Section 226(h) are plainly designed to apply in lieu of, not in addition to, the tariffing requirements of Section 203(a). Section 226 applies to "providers of operator services," which are defined as "any common carrier that provides operator services or any other person determined by the Commission to be providing operator services[,]" 47 USC § 226(a)(9). If the Section 203 requirement were absolute, then, Section 226 would impose a second, duplicative filing requirement on these carriers. Section 226(h)(1)(A) also provides that any changes in informational tariffs "shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect[;]" in contrast, Section 203(b)(1) states that "[n]o changes shall be made in the charges, classifications, regulations or practices which have been . . . filed and published [under Section 203(a)] except after one hundred twenty days notice to the Commission and to the public . . . ." Again, Congress would not have imposed the same-day notice requirement in Section 226 if a more stringent requirement already existed under other provisions of the statute. Unlike Section 203, Section 226(h) does not contain any provision permitting the Commission to make modifications or exceptions to the filing requirements; but, as noted above, Section 226(h)(1)(B) expressly authorizes

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[5] It is an interesting, but *purely academic*, question whether the forbearance policy would have been consistent with the Act in the absence of the 1990 amendment. The Commission must, of course, construe the statute as it is now in effect, and not as it existed at some earlier date. In particular, decisions such as *MCI v. FCC, supra*, which construed the Act prior to the 1990 amendment, cannot stand in the face of explicit Congressional adoption and approval of a contrary construction.

the Commission, under certain conditions, to waive the informational tariff requirement after four years from the date of enactment of the section. In summary, Section 226 imposes less onerous tariffing requirements on its face than Section 203, but also allows the Commission less discretion with respect to the implementation of these requirements. This statutory scheme makes sense only if Congress meant to continue the Commission's broader discretion under Section 203 with respect to all services other than operator services. This is particularly true because the Operator Services Act was expressly adopted as remedial legislation to address reported consumer abuses in the operator services field; it would be extremely irrational for Congress to respond to an apparent problem by subjecting the problem service to *less* stringent regulation than all others.

The distinction between informational tariffs and dominant carrier tariffs is buttressed by the legislative history of Section 226. The Senate Report for S. 1660, which was in large part adopted by the House of Representatives and enacted into law, states as follows:

> [T]he Committee does not expect that these informational tariffs would require the same amount of supporting documentation as required of most dominant carriers. For instance, the Committee does not expect that the [Operator Service Providers] will be required to comply with all the requirements of Part 61 of the FCC's rules.
>
> . . . The Committee does not intend with this provision to change the filing requirements of any of the dominant carriers.

S. Rep. No. 101-439 at 23 (101st Cong., 2d Sess.), *reprinted in* 1990 US Code Cong. & Admin. News 1577, 1599. The references to "dominant carriers" make clear, if there was ever any doubt, that Congress was well aware of the Commission's *Competitive*

Carrier classifications and its regulatory treatment of non-dominant carriers, including tariff forbearance. The Senate Report states explicitly that Congress knew that non-dominant providers of operator services did not have to file tariffs under existing laws and intended to change that situation, but not to reimpose *full* tariff regulation on Operator Service Providers; it did not intend to relax the filing requirements for dominant carriers.

There would simply be no reason for Congress to have enacted Section 226(h) unless it meant to reaffirm the Commission's statutory interpretation that the existing Section 203 tariff requirements are *not* mandatory. "Informational tariffs" would be a meaningless duplication of paperwork if all common carriers, including interexchange carrier providers of operator services, were already required to file tariffs under Section 203.[6] Moreover, there would be no point in authorizing the Commission to waive the informational tariff requirement (and resume tariff forbearance) unless the Commission also had authority to waive Section 203. A waiver of Section 226(h) alone would be nonsensical if operator service providers remained subject to a mandatory and non-waivable Section 203. Moreover, Section 226(h) cannot be construed as superseding Section 203 with respect to operator services only, but leaving Section 203 in effect as to all other common carrier services, because Section 226(i) provides that "[n]othing in this section shall be construed to alter the obligations, powers, or duties of common

[6] Indeed, if Congress believed that Section 203 compelled operator service providers and other carriers to file tariffs, it would almost certainly have expressly rejected the Commission's forbearance policy in the 1990 amendments. Rather than challenge the tariffing distinction adopted by the Commission between dominant and non-dominant carriers, Congress embraced it.

carriers or the Commission under the other sections of this Act." 47 USC § 226(i). Thus, Section 226 cannot be read to create an exception to Section 203 that did not already exist in the Act. The statute only makes sense, therefore, if Congress intended to ratify and confirm the Commission's previous rulings adopting a policy of permissive forbearance for non-dominant carriers.

C. The Supreme Court's *Maislin* Decision Has No Effect On the Commission's Forbearance Authority

AT&T's argument in its complaint against MCI relied almost exclusively on the recent decision of the U.S. Supreme Court in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S Ct 2759 (1990). In that case, the Court determined that, under the Interstate Commerce Act ("ICA"), a motor common carrier was entitled to collect its tariffed charge from a shipper notwithstanding an Interstate Commerce Commission policy allowing carriers to negotiate binding contracts at rates that were less than the tariff rate. As noted in the *NPRM*, para. 6, the Court stated that the tariff requirement was "utterly central" to the administration of the Interstate Commerce Act and could not be modified by the ICC.

The *Maislin* decision, however, is not binding on this Commission, and does not establish a precedent for interpretation of the Communications Act, for several reasons. First, not only was *Maislin* decided under a different statute and an increasingly disparate regulatory scheme, but the tariff provisions of the ICA differ in significant respects from Section 203. Section 10761 of the ICA provides unequivocally that "[e]xcept as *provided in this subtitle*, a carrier providing transportation or service subject to the jurisdiction of

the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter." 49 USC § 10761(a) (emphasis added). The roughly corresponding provision of the Communications Act is Section 203(c) which, as noted above, contains a considerably broader exception to the tariff requirement: service must be provided under tariff "unless otherwise provided by *or under the authority of* this Act[.]" Thus, while the ICA permits non-tariffed service only where expressly directed by statute, the Communications Act recognizes that the Commission may permit non-tariffed service under its general grant of statutory authority. Unlike this Commission, the ICC evidently is foreclosed from exempting any motor common carriers from the statutorily-mandated tariff requirements.

Second, *Maislin* was decided in the absence of any Congressional review of or ratification of the ICC's "negotiated rates" policy, in stark contrast to the Congressional approval of forbearance that is manifest in Section 226(h). The principal indication of Congressional intent relied upon in *Maislin* was the Motor Carrier Act of 1980. *See* 110 S. Ct. at 2769. Although the Motor Carrier Act significantly loosened the regulation of motor common carriers, it did not (unlike the 1990 operator services amendment) make any change to the specific tariff requirements applicable to common carriers. To the contrary, the Court concluded that, because Congress had adopted a provision permitting the ICC to exempt motor *contract* carriers from filing tariffs, it "is aware of the [tariff] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." *Id.* at 2771 (emphasis in original). Here, the situation is precisely the

opposite, since the 1990 amendment to the Communications Act demonstrates that Congress is aware that non-dominant common carriers are *not* required to file tariffs, and has chosen not to disturb that situation except to a limited extent with respect to operator services.

For these reasons, the *Maislin* Court's interpretation of the ICA is clearly distinguishable from the issue before the Commission, and does not compel any change in the existing tariff forbearance policy.

III. EVEN IF THE FORBEARANCE POLICY WERE FOUND UNLAWFUL, THE COMMISSION COULD AND SHOULD ADOPT MAXIMUM STREAMLINING OF TARIFF REGULATION FOR NON-DOMINANT CARRIERS

As set forth in the preceding section of these Comments, the Commission's policy of forbearance is lawful, and there is therefore no need to address the issues set forth in paragraphs 8(b), (c), and (d) of the *NPRM*. Rather, this docket should be dismissed without action.

Assuming for the sake of argument, however, that the forbearance policy were found to be unlawful, the *only* consequence of such a decision would be that the Commission would have to comply with the letter of the statute and require *all* common carriers to fulfill no more than the minimum requirements set forth in Section 203 with respect to tariffs. As discussed in Section I of these Comments, the Commission's policy rationale for seeking to minimize the regulatory burdens upon non-dominant carriers remains valid today (especially for the incipient competitive access carrier industry), and

is not even at issue in this docket; therefore, any new tariffing requirement imposed on these carriers should be limited to the minimum required by statute.

A. If Forbearance Were Unlawful, *All* Rates For Common Carrier Services, Without Exception, Would Have To Be Tariffed

It is indisputable that, if AT&T's restrictive interpretation of the "filed rate doctrine," based upon *Maislin*, were to prevail, then the Commission could not make any exceptions under any circumstances to the requirement that rates for common carrier services be filed in tariffs.[7] AT&T's argument in its complaint against MCI, and in related judicial proceedings, has been that Section 203(a) means exactly what it says: "*Every* common carrier . . . *shall* . . . file with the Commission . . . schedules showing *all* charges . . . for interstate and foreign wire or radio communications . . . ." (Emphasis added.) AT&T contends that the statute does not admit of any exceptions to this rule, although (as shown in the preceding section) there is ample authority to support a contrary interpretation.

Nonetheless, the statute only admits of two possible readings—either the Commission has authority to make exceptions to the tariff requirements, or it does not. If it does, then the current forbearance policy is lawful and no further action is required. But, if the Commission has no authority to forbear from requiring tariffs to be filed (as

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[7] Under Section 203(a), "connecting carriers" are not required to file tariffs themselves; however, the rates charged by connecting carriers are required to be set forth in the tariffs of the interstate carriers with which they connect. It would be premature to consider, at this time, whether MFS is a connecting carrier for purposes of the Act, but it could be necessary for the Commission to address this issue if it decides to impose new tariffing requirements on non-dominant carriers.

the Supreme Court held in *Maislin* that the ICC has no authority to excuse any motor common carrier from complying with its filed tariffs under any circumstances), then clearly the Commission must require tariffing of *all* rates for *all* interstate services offered by *all* common carriers, without exception. There is no provision anywhere in the Act that can be construed as permitting the Commission to exempt some non-dominant carriers, but not others, from the tariff requirement.[8]

The implications of AT&T's argument must be clearly understood. Under the Act, a "common carrier" is any person who offers interstate or foreign communications services indiscriminately to the public, or to that portion of the public that its system is suited to serve, either by obligation or by choice.[9] The Commission repeatedly has recognized that resellers of communications services are themselves common carriers, if they offer their services generally to eligible customers.[10] Indeed, one of the initial

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[8] The only possible exception is Section 222(b)(1), which provides that the Commission "shall forbear from exercising its authority under this Act" with respect to record carriers "as the degree of competition among record carriers reduces the degree of regulation necessary to protect the public." 47 USC § 222(b)(1). If, however, the Section 203 tariff obligation were construed as an absolute statutory requirement as urged by AT&T, then it is doubtful whether even the affirmative direction to "forbear" would create an exception to that rule. The phrase "forbear from exercising its authority under this Act" would appear to apply only to those matters as to which the Commission has been empowered to exercise discretionary authority under the Act; if the Commission had no authority to impose or to remove tariff duties, then it would have no "authority" that it could forbear from exercising.

[9] *NARUC v. FCC, supra*; *see also NorLight*, 2 FCC Rcd. 132 (1986), *recon. denied*, 2 FCC Rcd. 5167 (Aug. 24, 1987), *appeal dismissed, Public Service Comm'n of Wisconsin v. FCC*, No. 87-1618 (D.C. Cir. Feb. 15, 1989); *Public Service Co. of Okla.*, Declaratory Ruling, DA 88-544, 3 FCC Rcd 2327, para. 16 (Priv. Rad. Bur. 1988).

[10] *See Competitive Carrier Rulemaking, supra*, Second Report and Order, 91 FCC 2d at 75 n.* (Concurring Statement of Commissioner Fogarty; approving Commission's rejection of so-called "definitional" approach that would treat resellers as non-common carriers); *Resale*
(continued...)

reasons stated by the Commission for adopting its forbearance policy was the unnecessary burden that regulation would place upon the large number of resellers, "particularly . . . the thousands of hotels and motels desiring to resell long-distance telephone services to their guests."[11] If the Commission were to determine that all common carriers must file tariffs, then it would have to extend that requirement to hotels, motels, hospitals, coin telephone operators, shared tenant service providers, Centrex resellers and other "switchless" resellers, and every other entity that bills customers for long-distance services using a generally-applicable rate schedule, as well as to all facilities-based interstate carriers (including telephone, packet-switched data, video, satellite, and any other category of common carrier now treated as non-dominant).

It is hardly necessary to describe the costs and burdens that would be placed upon the Commission itself if it were necessary to receive and process tariff filings from all of these myriad entities, as well as the near-impossibility of enforcing the law on any consistent or equitable basis. Nor is it difficult to imagine the substantial waste of economic resources of private parties in complying with the tariff requirement, with no apparent offsetting public benefit. The primary beneficiaries of AT&T's approach, ironically, would be those resellers who may choose to ignore the law in order to gain

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[10](...continued)
and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *amended on recon.*, 62 FCC 2d 588 (1977), *aff'd, American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 24-26 (2d Cir. 1978).

[11] *Competitive Carrier Rulemaking, supra*, Second Report and Order, 91 FCC 2d at 63.

a cost advantage over their competitors who comply, knowing that the probability of detection and sanction will be minuscule.

MFS respectfully urges the Commission to weigh these potential consequences before embarking in any change of its well-settled interpretation of the Act, or departing from its remarkably successful and beneficial policy of forbearance.

B. If Tariffing Is Required, the Commission Should Seek To Reduce Dramatically the Burdens Imposed By Its Current Tariff Rules On Non-Dominant Carriers

The considerations discussed in the preceding section, as well as the Commission's underlying policy reasons for seeking to minimize the regulatory burdens on non-dominant carriers as set forth in the *Competitive Carrier* decisions, suggest that if any tariff filing requirements are imposed upon these carriers, the Commission should seek to keep the filing burdens to the absolute minimum required by statute. The current Part 61 tariff filing rules were designed to enable the Commission to oversee the rates of dominant carriers, and many of these rule provisions are neither mandated by the statute (even under AT&T's restrictive interpretation) nor necessary for the minimal regulation of non-dominant carriers consistent with the *Competitive Carrier* policy. Accordingly, MFS would urge the Commission to substantially relax these rules for non-dominant carriers to the extent, if any, that it decides to require the filing of tariffs.

MFS concurs with the suggestions for tariff process streamlining contained in the comments being filed today by the Competitive Telecommunications Association, including permitting non-dominant carriers to change rates on one days' notice without

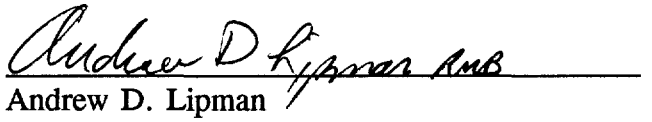
filing cost support; a presumption of lawfulness for all non-dominant carriers' tariffs (as under current rules); substantially reduced tariff filing fees; and authority to file flexible and/or banded rates, among other things. In addition, MFS proposes that the Commission amend 47 CFR § 61.74(a), which generally provides that tariffs may not contain references to other tariffs or publications. The Commission should permit non-dominant carriers to reference the filed tariffs of other carriers, and to reference tariff publications (of the same or a different carrier) filed with state regulatory commissions. Many non-dominant carriers would find it convenient to cross-reference provisions of other carriers' tariffs, either to incorporate general terms and conditions, descriptions of specific services, methods of computing mileage and time-of-day rates, or even to cross-reference rate tables.[12] Also, if the Commission permitted cross-references to state tariffs, then carriers could amend service terms and other tariff provisions for both interstate and intrastate services by making a single filing with a state regulatory agency.

[12] For example, in some instances a non-dominant carrier may wish to define its rate as a specific percentage of the dominant carrier's rate for a comparable service. A cross-reference would permit the non-dominant carrier to "mirror" the dominant carrier's rates without having to file a new tariff every time the dominant carrier changes a rate element.

CONCLUSION

For the foregoing reasons, the Commission should determine that its existing policy of forbearance with respect to tariffs for the domestic interstate services of non-dominant carriers is consistent with the Communications Act, and should dismiss this proceeding.

Respectfully submitted,



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Dated: March 30, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 1992, copies of Comments of Metropolitan Fiber Systems, Inc. were served by hand on the following:

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